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No. ——

IN THE
Supreme Court of the United States

MASSACHUSETTS FOOD ASSOCIATION, *et al.*,
Petitioners,

v.

MASSACHUSETTS ALCOHOLIC BEVERAGE CONTROL COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether state statutes that otherwise irreconcilably conflict with Section 1 of the Sherman Act escape preemption simply because the private parties are not required to reach an agreement on the anticompetitive conduct?

2. Whether state statutes that irreconcilably conflict with Section 1 of the Sherman Act can escape preemption where the state has engaged in no active supervision of the conduct by private parties whatsoever?

LIST OF PARTIES

Petitioners Massachusetts Food Association, Roche Bros. Supermarkets, Inc., The Stop & Shop Companies, Inc., Packaging Center, Inc., BJ's Wholesale Club, Inc., Mormax Corporation, The Edwin R. Sage Company, Inc., Trader Joe's Co. and Trader Joe's East, Inc. were appellants in United States Court of Appeals for the First Circuit. The Massachusetts Alcoholic Beverages Control Commission Commissioners Walter Sullivan, Suzanne Iannella and Frederick Riley were appellees in the court of appeals and are the respondents here.

RULE 29.6 LISTING

Massachusetts Food Association has no parent corporations and no nonwholly owned subsidiaries.

Roche Bros. Supermarkets, Inc. has no parent corporations and no nonwholly owned subsidiaries.

The Stop & Shop Companies, Inc. is a wholly-owned subsidiary of Ahold USA Holdings, Inc., which is a wholly-owned subsidiary of Koninklijke Ahold nv. Packaging Center, Inc is a wholly-owned subsidiary of The Stop & Shop Companies, Inc. and has no nonwholly owned subsidiaries.

BJ's Wholesale Club, Inc. has no parent corporations and no nonwholly owned subsidiaries. Mormax Corporation is a wholly-owned subsidiary of BJ's Wholesale Club, Inc. and has no nonwholly owned subsidiaries.

The Edwin R. Sage Company, Inc. has no parent corporations and no nonwholly owned subsidiaries.

Trader Joe's Co has no parent corporations and no nonwholly owned subsidiaries. Trader Joe's East, Inc. is a wholly-owned subsidiary of Trader Joe's Co. and has no nonwholly owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit, reported at 197 F.3d 560 (1st Cir. 1999), is set forth in Appendix A. The opinion of the United States District Court for the District of Massachusetts, reported at 184 F.R.D. 217 (D. Mass. 1999), is set forth in Appendix B. The district court's order of dismissal is set forth in Appendix C.

STATEMENT OF JURISDICTION

The opinion of the court of appeals affirming the district court's order dismissing petitioners' amended complaint was entered on December 2, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Article VI of the United States Constitution provides in part that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . ." This case involves Section 1 of the Sherman Act, 15 U.S.C. § 1 (1999), which provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

At issue under the Supremacy Clause and Section 1 is a Massachusetts statute, MASS. GEN. LAWS ch. 138, § 15 (1999), which provides in pertinent part:

> The local licensing authorities in any city or town . . . may grant licenses for the sale at retail of such alcoholic beverages . . . not to be drunk on the premises, to applicants therefor . . . . No person, firm, corporation, association, or other combination of persons, directly or indirectly, or through any agent, employee, stockholder, officer or other person or any subsidiary whatsoever, shall be granted, in the aggregate, more than three such licenses in the commonwealth . . . .

STATEMENT OF THE CASE

A. Statement of Facts

In 1933, concurrent with the repeal of prohibition, Massachusetts enacted a series of statutes governing the trade of alcoholic beverages throughout the state. Contemporaneously several other states enacted similar regulatory regimes.

In 1998, a group of Massachusetts liquor retailers raised a Sherman Act challenge to that portion of the Massachusetts liquor regulatory scheme that required liquor wholesalers to post their prices and adhere to those prices for a period of one month. MASS. GEN. LAWS ch. 138, § 25A. The district court held that the statute and related regulations irreconcilably conflicted with Section 1 of the Sherman Act and that Massachusetts was not entitled to state-action immunity, even though the statute did not require any agreement between the wholesalers. *Canterbury Liquors & Pantry v. Sullivan*, 16 F. Supp. 2d 41, 51 (D. Mass. 1998), *appeal dismissed by Sea Shore Corp. v. Sullivan*, 158 F.3d 51 (1st Cir. 1998) (preempting horizontal price post-and-hold statute). Wholesalers of alcoholic beverages in Massachusetts are now free to price their product as they see fit and compete aggressively, as intended under the Sherman Act.

In this case, petitioners challenged another portion of the Massachusetts liquor regulatory regime—the Massachusetts statute that limits every retailer of alcoholic beverages to only three stores throughout the entire state. MASS. GEN. LAWS ch. 138, § 15. Petitioners are retailers engaged in the sale of food, general merchandise and alcoholic beverages in Massachusetts and their trade association. Although each petitioner-retailer operates more than three retail stores in Massachusetts, each is limited by the statute to selling alcoholic beverages at only three

of its stores. For example, petitioner Stop & Shop operates 93 supermarkets in the Commonwealth of Massachusetts, yet is limited under the statute to selling alcoholic beverages at only three of its locations. But for the statute, each petitioner-retailer would sell alcoholic beverages at more of its stores.

Predictably, the Massachusetts three-store limit statute has created anticompetitive local markets for the sale of liquor throughout Massachusetts. As the court of appeals and the district court held, and the parties concede, the statute mandates conduct that would be a *per se* violation of Section 1 of the Sherman Act if the subject of a private agreement. The statute's flat three-store limit restricts every competitor's number of outlets, thereby raising prices higher than in competitive markets in other states. Although Massachusetts has mandated conduct in direct and irreconcilable conflict with the Sherman Act, it does not actively supervise the anticompetitive effects of its alcohol regime. Massachusetts' lone supervisory act is to enforce its three-store limit. Massachusetts does not evaluate the overall location and distribution of retail liquor outlets throughout the state; private actors are free to allocate territories as they see fit. It also does not ensure that the discretion given to private market participants comports with its regulatory objectives. Nor does Massachusetts regulate or supervise the anticompetitive pricing power bestowed upon liquor retailers. Massachusetts does nothing except restrict each retailer to three outlets. Petitioners contend that Massachusetts must engage in some degree of regulation or review, otherwise the statute is preempted.

B. Proceedings Below

Petitioners challenged the constitutionality of the statute in the United States District Court for the District

of Massachusetts. The jurisdiction of the district court was invoked under 15 U.S.C. §§ 15, 26 and 28 U.S.C. §§ 1331, 2201(a). Petitioners asserted that the Massachusetts statute constitutes an output and territorial restriction that irreconcilably conflicts with Section 1 of the Sherman Act, 15 U.S.C. § 1, and is therefore preempted pursuant to the Supremacy Clause of the United States Constitution. Respondents moved to dismiss the action for failure to state a claim upon which relief can be granted. The district court granted the motion and dismissed petitioners' amended complaint.

Petitioners appealed to the United States Court of Appeals for the First Circuit. On December, 1999, the court of appeals affirmed the district court's order. Pet. App. 1a. The court of appeals agreed with petitioners that the Massachusetts statute contemplated *per se* unlawful conduct, but held that the statute escaped preemption because it did not require or authorize the liquor retailers to enter into private arrangements or agreements that suppress competition. Pet. App. 6a.

REASONS FOR GRANTING THE WRIT

This case presents a unique opportunity for this Court to address the issues governing preemption of state-compelled, *per se* illegal conduct under the Sherman Act. This case is of the utmost importance, first, because the First Circuit's abbreviated approach to Sherman Act preemption jurisprudence fails to comport with this Court's decisions and, second, because its holding creates a clear and direct conflict with the Ninth Circuit. This Court's consideration is especially necessary in light of the court of appeals' own assessment that existing "case law [in the area of Sherman Act preemption] is not entirely coherent." Pet. App. 4a.

This Court has made clear that "Congress exercis[ed] all the power it possessed under the Commerce Clause when it approved the Sherman Act." *California Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 103 (1980) (citation omitted) ("*Midcal*"). As a result, this Court consistently has preempted state liquor statutes that mandate conduct constituting a *per se* restraint of trade as being in irreconcilable conflict with the Sherman Act. *See, e.g., 324 Liquor Corp. v. Duffy*, 479 U.S. 335, 342-43 (1987) ("*Duffy*"); *Midcal*, 445 U.S. at 103; *Schwegmann Bros. v. Calvert Distillers*, 341 U.S. 384 (1951) ("*Schwegman*").[1]

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[1] *See also Hertz Corp. v. City of New York*, 1 F.3d 121, 127 (2nd Cir. 1993) (preempting horizontal statute that "removes one element of competition in car rental pricing" as mandating *per se* unlawful conduct under the Sherman Act); *Miller v. Hedlund*, 813 F.2d 1344 (9th Cir. 1987) (holding that an Oregon statute requiring that beer and wine distributors adhere to previously announced prices was a *per se* violation of the Sherman Act and thereby preempted); *Beer & Pop Warehouse v. Jones*, 41 F. Supp.2d 552 (M.D. Pa. 1999) (enjoining horizontal price and hold statute because it was a *per se* violation of the Sherman Act); *Canterbury Liquors & Pantry v. Sullivan*, 16 F. Supp.2d 41 (D. Mass. 1998) *appeal dismissed by Sea Shore Corp. v. Sullivan*, 158 F.3d 51 (1st Cir. 1998) (preempting horizontal price post-and-hold statute that required liquor distributors to adhere to a price schedule because it constituted a *per se* violation of the Sherman Act); *Anheuser-Busch, Inc. v. Goodman*, 745 F. Supp. 1048 (M.D. Pa. 1990) (striking down Pennsylvania alcohol price regulation regime as a *per se* violation of the Sherman Act); *State of Kansas v. Lamb*, 1987-1 Trade Cases (CCH) ¶ 67,521 (D. Kan. 1987) (preempting a minimum price markup statute); *Alcoholic Beverages Control Bd. v. Taylor Drug Stores, Inc.*, 635 S.W.2d 319 (Ky. 1982) (holding that provisions of Kentucky Distilled Spirts and Wine Fair Trade Act violated the Sherman Act because the act allowed for state sanctioned retail price maintenance); *Lewis-Westco & Co. v. Alcoholic Beverages Control Appeals Bd.*, 186 Cal. Rep. 552 (Cal. Ct. App. 1982) (preempting horizontal price posting alcohol statute as mandating *per se* unlawful conduct under the Sherman Act).

Those state laws that mandate private conduct falling under rule of reason analysis rather than *per se* treatment are not preempted

I. THE DECISION OF THE COURT OF APPEALS IS FUNDAMENTALLY AT ODDS WITH THE DECISIONS OF THIS COURT AND DISRUPTS THE FABRIC OF SHERMAN ACT PREEMPTION JURISPRUDENCE

Although this Court has been exceptionally rigorous in limiting federal preemption to a few narrow applications, one such application consistently arises when a state statute impedes upon the basic economic freedoms guaranteed by the Sherman Act. Noting that in the typical preemption case the "inquiry is whether there exists an irreconcilable conflict between the federal and state regulatory schemes," this Court made clear in *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982) ("*Rice*"), that a state statute is struck down under the Sherman Act "only if the statute on its face irreconcilably conflicts with federal antitrust policy." *Id.* at 659. This Court held that a state statute is void:

> only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply. Such condemnation will follow under § 1 of the Sherman Act when the conduct contemplated by the statute is in all cases a *per se* violation. If the activity addressed by the statute does not fall into that

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under the Sherman Act. *See, e.g., Rice v. Norman Williams Co.*, 458 U.S. 654, 661 (1982). The vast majority of commercial arrangements are evaluated under rule of reason analysis, and this Court has recently narrowed the zone of private conduct subject to *per se* treatment. *See, e.g., State Oil Co. v. Khan*, 522 U.S. 3 (1997) (vertical agreements that limit maximum resale price maintenance do not constitute *per se* violations of Section 1 of the Sherman Act). Thus, no rampant reexamination of state statutes, as feared by the court of appeals, is threatened here; only those rare statutes mandating conduct by private parties that would be a *per sse* violation of Section 1 would ever be scrutinized.

> category, and therefore must be analyzed under the rule of reason, the statute cannot be condemned in the abstract. Analysis under the rule of reason requires an examination of the circumstances underlying a particular economic practice, and therefore does not lend itself to a conclusion that a statute is facially inconsistent with federal antitrust laws.

Id. at 661.

A statute that is otherwise preempted under *Rice*, however, will survive if the state qualifies for state-action immunity consistent with this Court's decision in *Parker v. Brown*, 317 U.S. 341 (1943). State-action immunity requires that: "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." *Midcal*, 445 U.S. at 105 (citation omitted). Together these principles ensure that the Sherman Act will invalidate only those state regulatory regimes that both irreconcilably conflict with federal antitrust policy and are not the product of state involvement.

The *Rice* progeny amply reveal a well-worn path of judicial analysis for assessing whether the Sherman Act preempts a state statute. A court must first determine whether the statute authorizes or mandates conduct properly characterized as falling within one of a few well-defined categories of conduct considered *per se* unlawful if the subject of a private agreement. *See, e.g., Duffy*, 479 U.S. at 341; *Midcal*, 445 U.S. at 102. Where the answer is no, the inquiry is complete and the state statute does not facially conflict with the Sherman Act. *See, e.g., Rice*, 458 U.S. at 661 (holding that vertical non-price restraint was not *per se* unlawful conduct). If the answer is yes, then the statute is subject to preemption but the court must determine whether the regulatory regime is

exempt state action. *See, e.g., Duffy*, 479 U.S. at 343; *Midcal*, 445 U.S. at 103.

In this case all the parties and the courts concede a *per se* violation of the antitrust laws; thus under *Rice*, Massachusetts must undertake some form of "active supervision" of the private parties, which it squarely has not done; otherwise, the statute is preempted.

The court of appeals departed from this analytical framework. Although the First Circuit conceded that the conduct mandated by the Massachusetts statute would constitute a *per se* violation of the federal antitrust laws if agreed to by private parties, it held that an otherwise *per se* unlawful state statute nevertheless escapes preemption by the Sherman Act if it does not require an agreement or concerted activity among the private market actors. Pet. App. 6a. The court of appeals stated that in this case:

> there is nō private agreement or arrangement between retailers as to the number of retail outlets and therefore no violation to be shielded. The state simply insists upon licensing retail liquor stores—as it does for many businesses or professions—and limits the number of licenses to three per owner.

Pet. App. 6a. The First Circuit therefore never even considered the degree of state regulation of the anticompetitive conduct, unlike *Duffy* or *Midcal*.

In no other case has the standard Sherman Act preemption analysis been derailed by the absence of a private agreement. Although an "agreement" is the cornerstone of any Sherman Act prosecution of private parties, in the preemption context state compulsion or authorization of an anticompetitive marketplace stands in place of the agreement. The *Rice* formulation does not stipulate that preemption of a statute turns upon anything other

than the character of the restraint, much less upon the existence of a "private agreement or arrangement." Indeed, the decisions of this Court firmly establish that a private agreement is not required for preemption.

In both *Midcal* and *Duffy*, this Court invalidated state statutes because they "*mandated* resale price maintenance, an activity that has long been regarded as a *per se* violation of the Sherman Act." *Duffy*, 479 U.S. at 343 (emphasis in original; citations omitted). In neither case was there a private agreement among competitors to engage in price fixing. Indeed, this Court expressly rejected the argument that a private agreement was required in the preemption context. *Id.* at 345 n.8 ("[We] reject appellees' contention that there is no 'contract combination . . ., or conspiracy, in restraint of trade."). The question presented is whether the state law is on its face in conflict with the Sherman Act. In both cases, the impetus for the private conduct was the state regulation and this alone was sufficient for the statute to be preempted.

Sandwiched between *Midcal* and *Duffy* is this Court's decision in *Fisher v. Berkeley*, 475 U.S. 260 (1986), on which the court of appeals relied heavily. This is the lone case offering an inkling of support for the court of appeals' novel approach to preemption. Under the rent-control regime at issue in that case, the municipal reviewing board for the City of Berkeley implemented strict rent ceilings fixing the maximum rental prices for every parcel of real property, reviewed annually the rent ceilings to allow increases in response to market conditions, and permitted landlords to exceed the prescribed rents only with the express approval of the reviewing board. *Id.* at 262. Berkeley's system of supervision and control over rental prices prevented all non-state-sanctioned anti-competitive action because landlords in Berkeley were without discretion to charge prices above the maximum

rents established by the reviewing board. After reviewing Berkeley's regulatory scheme, including its annual pricing review and case-by-case review of individual appeals, the *Fisher* Court held that the regime was not preempted because "control over the maximum rent levels of every affected residential unit has been unilaterally removed from the owners of those properties and given to the [municipal reviewing board]." *Id.* at 267. In short, Berkeley, not the private landlords, had "complete control" of pricing.

In reaching its conclusion, the *Fisher* Court noted that its earlier decisions concerning prosecution of private parties under Section 1 of the Sherman Act always required "concerted effort by more than one entity." *Id.* at 266. Relating those decisions to a case of preemption, the *Fisher* Court differentiated between so-called "hybrid" restraints and "unilateral" restraints. Hybrid restraints were described as those granting "a degree of private regulatory power;" such as the restraints in *Midcal* and *Schwegmann*. *Id.* at 267-68 (quoting *Rice*, 458 U.S. at 665). The restraint in *Fisher* was not so characterized because the Berkeley regime "places complete control over maximum rent levels exclusively in the hands of the [municipal reviewing board]." *Id.* at 269. Thus, in *Fisher* terms, where a statute, rather than private parties through an agreement, mandates conduct that is *per se* illegal, the statute will be preempted only if private parties are left with competitive discretion that goes unsupervised by the state.

This was made clear the following term, as this Court underscored the import of the *Fisher* discussion in *Duffy* by addressing it only in the context of the active supervision requirement. *Duffy*, 479 U.S. at 345 n.8. The First Circuit, however, never reached any analysis of the active supervision requirement, making no inquiry of the

Commonwealth's administration of its three-store-limit. It simply held that the statute escaped preemption because there was no private agreement. In essence, it adopted a *Fisher* conclusion but short-circuited the analysis prescribed by this Court by following a literal interpretation of the "agreement" requirement.

The decisions of this Court do not support the truncated analysis performed by the court of appeals. Especially in an area as uniquely consequential as preemption, the lower courts must adhere closely to the principles enunciated by this Court. Despite the court of appeals' characterization of Sherman Act preemption jurisprudence as "not entirely coherent" (Pet. App. 4a), this Court has made it abundantly clear that the subordination of unlawful state statutes to the principles of economic freedom embodied in the Sherman Act does not turn on the existence of a private agreement.

II. THERE IS A CLEAR AND DIRECT CONFLICT BETWEEN THE FIRST AND NINTH CIRCUITS AS TO THE REQUIREMENT OF A PRIVATE AGREEMENT FOR SHERMAN ACT PREEMPTION

The First and Ninth Circuits are split on the requirements for Sherman Act preemption of state statutes. The First Circuit held below that even though a statute requires private parties to engage in *per se* unlawful behavior, the absence of an agreement among regulated parties closes the door to further analysis and spares the state statute from preemption under the Sherman Act. On the other hand, the Ninth Circuit has held that the lack of an agreement is not dispositive. The import of the disagreement among the Circuits is that the statutes of different states may impinge upon competition in an identical manner, but one statute may be preempted by the Sherman Act while the other perseveres. The resulting split

among the courts of appeals creates uneven application of the Sherman Act among the several states.

A. The First Circuit's Decision Rejects The Ninth Circuit's Holding That A Private Agreement Is Not Required For Sherman Act Preemption

The Ninth Cicuit held in *Miller v. Hedlund*, 813 F.2d 1344 (9th Cir. 1987), that a statute may irreconcilably conflict with the Sherman Act and be preempted even though the statute does not require a private agreement. In that case, Oregon enacted regulations requiring liquor retailers to maintain posted retail beer and wine prices. The court found that the restraint on trade was "unlawful *per se* under the Sherman Act." *Id.* at 1349. The state had argued that the regulations did not irreconcilably conflict with the Sherman Act because there was no agreement or concerted activity to fix prices among the regulated parties who acted only in conformity with the regulations. *Id.* The Ninth Circuit flatly rejected the state's argument:

> The appellees' treatment of this difficult issue oversimplifies it. While it is true that there is no agreement or concerted activity among the wholesalers, it can not be ignored that the challenged regulations facilitate the exchange of price information and require adherence to the publicly posted prices. In other words, the state compels activity that would otherwise be a *per se* violation of the Sherman Act. It is the presence of state compulsion that requires a more refined analysis than the one presented by the appellees. Simply ending the analysis because of a lack of concerted activity among the wholesalers fails to take into account the presence and effect of the state's involvement in the matter.

Id. The court went on to hold that the Oregon regulations were not "unilateral state action" for two reasons. First,

as established in *Schwegmann*, "a showing of concerted activity among the Oregon wholesales is not necessary to establish an antitrust violation. The mere fact that each wholesaler complies unilaterally with the regulations does not save an impermissible pricing scheme from an antitrust challenge." *Id.* at 1350. Second, as in both *Schwegmann* and *Midcal*, "Oregon allows private parties to set the prices and does not review the reasonableness of those prices." *Id.* at 1351. In sharp contrast, the First Circuit has required a showing of concerted activity in order to preempt an otherwise unlawful state statute. As a result, the court of appeals found it unnecessary to undertake the *Midcal* analysis of whether Massachusetts actively supervised the anticompetitive effects of its regime.

B. The First Circuit's Decision Creates Enormous Confusion And Uncertainty On The Important Question Of The Extent Of Federal Preemption By The Sherman Act Of State Liquor Laws

It is of the utmost importance that the tenets of the Sherman Act be enuciated clearly and applied uniformly among the states, particularly where *per se* violations of the Sherman Act are involved. This Court has emphasized that the Sherman Act "was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 4 (1958). Accordingly, this Court has not shied from invalidating state measures that encroach upon these basic economic precepts. *See, e.g., Duffy*, 479 U.S. 335; *Midcal*, 445 U.S. 97; *Schwegmann*, 341 U.S. 384. Those efforts are futile, however, if the bounds of our economic rights vary at each state's edge.

Even the court of appeals conceded that its decision would muddle further the already murky waters of Sher-

man Act preemption analysis. The court of appeals rationalized its novel departure from the prior case law and the law of sister courts by observing that this Court's decisions in the Sherman Act preemption area are plagued by "resulting ambiguities." Pet. App. 4a. The court of appeals went on to observe that the prior precedents, including *Parker v. Brown*, 317 U.S. 341 (1943), and its progeny *Patrick v. Burget*, 486 U.S. 94 (1988), and *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 384 (1951), "have provoked endless litigation." Pet. App. 5a. Finally the court of appeals expressed concern that the "case law is not entirely coherent." Pet. App. 4a.

The First Circuit's novel decision will only foster additional litigation and result in uncertainty in this important area. The result of the court of appeals' analysis is to make unclear the application of the Sherman Act and Supremacy Clause to the laws of a number of states regulating retail liquor sales by private parties. The court of appeals ruling also creates uncertainty as to the legality of enforcement efforts by state alcohol regulators.

In their liquor laws, many states regrettably have compelled *per se* violations of the Sherman Act. In the area of *per se* limitations on the ability of a competitor to open stores, a number of states limit the number of retail locations absolutely to some arbitrary number, rather than engage in active state supervision.[2] Given the volume of

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[2] *See* ARK. CODE ANN. § 3-4-205(b)(1) (limiting retail liquor licenses to one); CONN. GEN. STAT. § 30-48(a) (limiting retail liquor licenses to two); DEL. CODE ANN. tit. 4 § 546 (limiting retail liquor licenses to two); GA. COMP. R. & REGS. r. 560-2-2-.40 (limiting retail liquor licenses to two); MD. CODE OF 1957, ART. 2B § 9-102 (limiting retail liquor licenses to one); MINN. STAT. § 340A.412 (limiting retail liquor licenses to one); N.J. STAT. ANN. § 33:1-12.31 (limiting retail liquor licenses to two); PA. STAT. ANN. tit. 47 § 4-438 (limiting retail liquor licenses to one);

commerce in alcohol, the overriding federal policy in favor of free markets expressed in the Sherman Act and the important state interests at stake, certiorari is warranted to ensure that lower courts be given a coherent, well-demarcated, state-federal boundary.

III. THE TRUNCATED ANALYSIS BY THE COURT OF APPEALS OF THE MASSACHUSETTS LIQUOR STATUTE AVOIDS ANY ANALYSIS OF THE DEGREE OF STATE REGULATION OR REVIEW AND CREATES A CONFLICT IN THE CIRCUITS

The Commonwealth of Massachusetts permits private parties to sell liquor through retail stores. Many states, such as Virginia, limit liquor sales through state-run ABC stores; such retail sales by the state obviously pass Sherman Act muster given the high degree of active supervision when the state itself acts as the relevant economic actor. *See Duffy*, 479 U.S. at 344 n.6 ("Such comprehensive regulation is immune under *Parker v. Brown* because the State substitutes its own power for 'unfettered business freedom.'") (citation omitted); *Midcal*, 445 U.S. at 106 n.9 (same).

The Commonwealth of Massachusetts for purposes of this appeal has conceded that it undertakes no supervision of private parties whatsoever. The Commonwealth does not regulate private stores' retail liquor prices. The Commonwealth does not review the private stores' prices. The Commonwealth does not actively supervise how the private economic actors allocate the stores throughout the state. The resulting pricing and location of competition is de-

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S.C. CODE ANN. § 61-6-140 (limiting retail liquor licenses to three); TEX. ALCO. BEV. § 22.04 (limiting retail liquor licenses to five); VT. STAT. ANN. tit. 7 § 229 (limiting retail liquor licenses to one). Whether and to what degree these states engage in "active supervision," as understood under *Parker*, is not before this Court.

termined solely by private actors. The Commonwealth has abrogated its responsibility to the benefit of these private actors. Having limited the number of stores absolutely, the Commonwealth cedes all decisions as to the allocation of stores and competitive behavior to private firms.

The ultimate result is predictable under the Sherman Act. Having selected an economic system that is different from that of free competition and market economics, the state's unwillingness to participate in the resulting anti-competitive marketplace leads to higher prices for consumers and reduced consumer choices.

Unlike the Ninth Circuit in *Miller*, or this Court in *Duffy*, *Fisher* and *Midcal*, the First Circuit has eliminated such indicia of active state supervision from the analysis. The First Circuit's truncated review of the state regulatory regime effectively eliminates Sherman Act preemption altogether. The First Circuit's apparent justification for truncating its analysis, apart from the absence of a private agreement, is its view that, for hybrid restraints, the state statute must expressly grant "a degree of private regulatory power" on the face of the statute. *See* Pet. App. 8a-9a. ("The Massachusetts statute limiting licenses to three per company does not . . . permit any competitor to determine the price or location of another."). By refusing to examine what the state has failed to do, after the state has mandated conduct that is *per se* illegal under the Sherman Act, the First Circuit's approach turns the relevant pre-emption analysis on its head. The First Circuit's approach avoids any consideration of the lack of state supervision or involvement in the resulting economic system altogether.

Neither the prior approach of this Court in *Duffy*, in the context of active state supervision, or the approach of this Court in *Fisher*, in the context of reviewing a hybrid restraint, refused to examine the degree of governmental

involvement in the resulting economic system, once free markets are abandoned. *See Duffy*, 479 U.S. at 343-45 (reviewing the absence of state control or review of pricing and the absence of a pointed reexamination); *Fisher*, 475 U.S. at 366 (reviewing aspects of Berkeley's rent control regime, including annual re-assessment and case-by-case review in concluding that "complete control" of pricing was with the government). The Ninth Circuit in *Miller*, following these decisions, reviewed the state's degree of involvement in the resulting economic regime and found a complete lack of state involvement in the private parties' pricing decisions:

> Oregon "neither establishes prices nor reviews the reasonableness of the price schedules . . . [nor does it] monitor market conditions or engage in any 'pointed reexamination' of the program." *Midcal, supra*, 455 U.S. at 105-06 [100 S. Ct. at 943-44] . . . . Oregon mandates the posting of prices to be charged by each wholesaler, but does not in any way review the reasonableness of the prices set. . . . Oregon merely authorizes and enforces the disputed practices."

813 F.2d at 1351. Other courts have followed the Ninth Circuit's approach.[3]

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[3] *See, e.g., Canterbury Liquors*, 16 F. Supp.2d at 48-51 (preempting price post-and-hold statute where Mass. Alcoholic Beverage Control Commission lacked the statutory authority to review or revise prices of alcohol); *Anheuser-Busch*, 745 F. Supp. at 1052-54 (expressly following *Miller* analysis, pre-empting state alcohol law where state did not set prices and had "no control over the reasonableness of the prices set;" state's enforcement of statute insufficient to constitute active supervision); *Lamb*, 1987-1 Trade Cases (CCH) ¶ 67,521 at 60,191-92 (preempting state alcohol law where the state "does not monitor market conditions or engage in any reexamination of the system. . . . This fact represents a complete abdication of the system to the wholesale distributors"); *Taylor Drug Stores*, 635 S.W.2d at 321-22 (preempting state alcohol law

The novel, truncated analysis of the First Circuit permits the private economic actions themselves to allocate markets and limit when and where output is sold, because private parties in Massachusetts determine where to establish liquor locations and make pricing decisions without state supervision or involvement. A truncated analysis of state law that fails to review the competitive discretion afforded private parties, who operate in an economic system in which competition has been curtailed by state-imposed *per se* limits on competitors, leads erroneously to the approval of a state law in facial conflict with the Sherman Act.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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where "the state has nothing to do with prices and the pricing of wines and liquors" except to enforce minimum price markup law); *Lewis-Westco*, 186 Cal. Rptr. at 557-58.

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 99-1277

MASSACHUSETTS FOOD ASSOCIATION, *et al.*,
Plaintiffs, Appellants,

v.

MASSACHUSETTS ALCOHOLIC BEVERAGES
CONTROL COMMISSION, *et al.*,
Defendants, Appellees.

No. 99-1280

MASSACHUSETTS FOOD ASSOCIATION, *et al.*,
Plaintiffs, Appellees,

v.

MASSACHUSETTS ALCOHOLIC BEVERAGES
CONTROL COMMISSION, *et al.*,
Defendants, Appellees,

and

WINE & SPIRIT WHOLESALERS OF MASSACHUSETTS, INC.,
et al.,
Appellants.

Appeals from the United States District Court
for the District of Massachusetts
(Hon. Douglas P. Woodlock, *U.S. District Judge*)

Before

Boudin, *Circuit Judge*,
Bownes, *Senior Circuit Judge*,
and *Lipez, Circuit Judge*.

December 2, 1999

BOUDIN, *Circuit Judge*. Massachusetts, like many other states, extensively regulates the sale of alcoholic beverages. Among other restrictions, retail outlets must be licensed, each license embraces only a single location, and no firm or person is allowed "more than three such licenses in the commonwealth . . . ." Mass. Gen. Laws ch. 138, § 15 (1998). Thus, no one can own more than three retail liquor stores in the Commonwealth. Although some state regulations also impinge on retail prices, *e.g.*, Mass. Gen. Laws ch. 138, § 25C, they are not at issue here.

The plaintiffs in this case—who include several supermarket chains—brought this action in the district court to enjoin enforcement of the three-store limit. The complaint charged that this statutory restriction conflicted with the Sherman Act, 15 U.S.C. § 1, *et seq.*, because it would be a *per se* violation of the Sherman Act for private competitors to agree with each other to impose such

a limitation. The complaint further alleged that the defendants, the members of the Massachusetts Alcoholic Beverages Control Commission, lacked power to supervise, and did not in fact supervise, the anticompetitive consequences of this limitation (*i.e.*, less competition and higher prices).[1]

Several organizations moved to intervene to defend the statute. One of them, the Massachusetts Package Stores Association ("MPSA"), is a trade association primarily representing retail liquor stores. The other two organizations—The Wine & Spirits Wholesalers of Massachusetts and the Massachusetts Wholesalers of Malt Beverages—are trade associations for alcoholic beverage wholesalers in Massachusetts. All three entities sought to intervene as of right or, in the alternative, as permissive intervenors. Fed. R. Civ. P. 25(a)(2), (b)(2). The Commission and its members moved to dismiss the complaint for failure to state a claim. Fed. R. Civ. P. 12(b)(6). After briefing and argument, the district court, on January 6, 1999, denied intervention to the trade associations but granted the defendants' motion to dismiss. *Massachusetts Food Ass'n* v. *Sullivan*, 184 F.R.D. 217, 228 (D. Mass. 1999).

The plaintiffs in the district court now appeal from the dismissal of their complaint. The trade associations that sought to intervene appeal from the denial of intervention (but in an amicus brief support the dismissal of the complaint). Our review of the judgment of dismissal is *de novo*. *Rogan* v. *Menino*, 175 F.3d 75, 77 (1st Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3274 (U.S. Oct. 14, 1999) (No. 99-646). Since we affirm the judgment of dismissal, the intervention issue is largely (al-

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[1] The complaint originally named the Commission itself as a defendant but, in response to an Eleventh Amendment objection, the members were substituted as defendants.

though not entirely) academic, and we return to it only after addressing the merits.

At first blush, one might think this is a strange complaint. The state statute limiting retail liquor outlets looks like a garden-variety act of local legislation limiting the number of licenses that the state will grant, and the statute neither authorizes nor directs private parties to engage in anticompetitive agreements among themselves. Putting aside the special status of state liquor regulation under the Twenty-First Amendment, U.S. Const. amend. XXI, § 2, one of the best settled rules in antitrust law is that the Sherman Act was not intended to "apply" to the states so as to foreclose otherwise valid state regulation. *Parker* v. *Brown*, 317 U.S. 341, 350-52 (1943); *see also Neo Gen Screening, Inc.* v. *New England Newborn Screening Program*, 187 F.3d 24, 28 (1st Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3263 (U.S. Oct. 8, 1999) (No. 99-617); *Tri-State Rubbish, Inc.* v. *Waste Management, Inc.*, 998 F.2d 1073, 1076 (1st Cir. 1993). But, as we shall see, there are qualifications on this general rule, and the case law is not entirely coherent. *See generally* I Areeda & Hovenkamp, *Antitrust Law* ¶ 221 (1997). With some ingenuity, the plaintiffs in this case have sought to make the most of the resulting ambiguities.

Almost from the outset, the immunity from the Sherman Act afforded to "state action" has been hedged by a concern with state laws deemed merely to authorize or direct conduct by private parties that—absent such state legislation—would violate the antitrust laws. *Cf. Parker*, 317 U.S. at 351-52. It is one thing to say that a state may itself regulate in an "anticompetitive" fashion; it is quite another to say that the state can effectively exempt *private* parties from obeying the antitrust laws. Thus, a

state cannot shield private parties from the federal antitrust laws by enacting a statute saying no more than that competing grocery stores may agree to fix prices; through the Supremacy Clause, the Sherman Act would preempt such a law.

This qualification is *itself* qualified. Under certain conditions, the states have been allowed to authorize or direct private conduct otherwise inconsistent with the Sherman Act. The main conditions are that the state do so as part of a deliberate policy to displace competition *and* that the state provide an alternative regime that provides "active supervision" of the conduct, *Patrick* v. *Burget*, 486 U.S. 94, 100 (1988); an example would be a specific authorization for joint ratemaking by intrastate carriers coupled with state agency authority to require that the resulting rates be just and reasonable. *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 471 U.S. 48 (1985); *see* I Areeda, *supra*, ¶ 226.

What state entities can adopt such a policy (state executives? local municipalities?), how clearly the policy must be articulated, and (above all) what kind of supervision will suffice are among the issues that provoked endless litigation. *See* I Areeda, *supra*, ¶ 226. For example, supervision may be a proxy for competition, designed to protect consumers (*e.g.*, utility regulation); but supervision is not clearly limited to cases of this character. *See, e.g., Patrick*, 486 U.S. at 100-01 (suggesting that state supervision reinforces requirement that anticompetitive behavior at issue be consistent with the state's deliberate policy).

But our facts do not require an examination of clear articulation, active supervision or other conditions for immunity. It is only where state legislation "would otherwise" be preempted by the Sherman Act that these fur-

ther inquires are required. *Fisher* v. *City of Berkeley, California*, 475 U.S. 260, 265 (1986). In this case, the state has not ordered or authorized private parties to engage in conduct that, absent immunity, would even arguably violate the antitrust laws; there is no private agreement or arrangement between retailers as to the number of retail outlets and therefore no violation to be shielded. The state simply insists upon licensing retail liquor stores—as it does for many businesses or professions—and limits the number of licenses to three per owner.

Despite disclaimers, the plaintiffs' case rests in the end on the implicit proposition that the Massachusetts statute is preempted because it produces an *effect* that could not be produced by agreement of private parties without violating the antitrust laws. Admittedly, private parties could not agree that each of them would operate only three such outlets. *United States* v. *Topco Associates, Inc.*, 405 U.S. 596 (1972); *Addamax Corp.* v. *Open Software Found., Inc.*, 152 F.3d 48, 51 (1st Cir. 1998).[2] This resemblance in effects is the gist of the plaintiffs' position, although it is narrowed by the suggestion that preemption may be confined to statutes that produce the same effect as a *per se* violation (rather than a non-*per se* one); and, of course, plaintiffs concede that even a *per se* violation would be all right if the requisite state policy and active supervision existed.

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[2] *Topco* may no longer be good law for its broader proposition that such a restraint is condemned *per se* even where it is ancillary to a productive joint venture. *Cf. Broadcast Music, Inc.* v. *CBS*, 441 U.S. 1, 20-24 (1979); *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 224-29 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987). But no one doubts that an independent agreement between private parties to limit output or divide markets is to be condemned *per se*. *See Palmer* v. *BRG of Georgia, Inc.*, 498 U.S. 46 (1990).

The difficulty with this "similar effects" argument is that much direct government regulation prohibiting one form of economic activity or requiring another involves directives that private parties could not themselves implement without violating the antitrust laws. For example, competing shoe stores could not agree on closing hours or holidays without committing *per se* violations of the antitrust laws; nor could competing taxi companies agree on the number of taxicabs to be operated; nor could cable companies agree that only one or two of them should serve a locality. Yet all of these results are examples of commonplace state or local regulation, sometimes accompanied by local price regulation but sometimes not.

To allow federal judges to decide which of these legislative enactments should survive and which should be condemned comes close to reintroducing the kind of judgments that got the Supreme Court into so much trouble in the *Lochner* era. The result might well be more competition and greater consumer welfare. But it would come at the cost of second-guessing the democratically elected legislature's decisions about the proper balance between competition and other social policies that are commonly reflected in such legislation. The Sherman Act is a "charter of economic liberty," *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1, 4 (1958), but only as against *private* restraints.

From these examples, it is evident that one must be careful in parsing general statements to the effect that states may not compel "private parties to engage in anticompetitive behavior." *324 Liquor Corp.* v. *Duffy*, 479 U.S. 335, 345-46 n.8 (1987). What is centrally forbidden is state licensing of arrangements between private parties that suppress competition—not state directives that *by themselves* limit or reduce competition. This is

the very distinction stressed by the Supreme Court in *Fisher* where it sustained the City of Berkeley's rent control ordinance (rent control being a classic constraint on competitive pricing). As the Court there explained,

> [a] restraint imposed unilaterally by government does not become concerted-action within the meaning of the statute simply because it has a coercive effect upon parties who must obey the law. The ordinary relationship between the government and those who must obey its regulatory commands whether they wish to or not is not enough to establish a conspiracy.

Fisher, 475 U.S. at 267.

The only fact patterns that give the plaintiffs any purchase is a set of Supreme Court decisions that struck down state statutes that were deemed to direct and implement private conduct replicating resale price maintenance schemes.[3] The schemes were structured to allow one party (manufacturer or wholesaler) to set the resale price to be charged by purchasers at the next level. The resemblance in form and function to traditional private resale price maintenance, *see Dr. Miles Medical Co.* v. *John D. Park & Sons, Co.*, 220 U.S. 373 (1911), was so close that the Supreme Court treated the arrangements as if they were nothing other than private resale price maintenance schemes licensed and abetted by the state.

There are no private restraints in this case, whether operating alone or in conjunction with state action. *Cf. Duffy*, 479 U.S. at 345 n.8. The Massachusetts statute limiting licenses to three per company does not authorize

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[3] *Duffy*, 479 U.S. 335; *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951).

or direct any private agreements or permit any competitor to determine the price or location of another. The three-store limit is no more an agreement among competitors, or subordination of one competitor to the dictates of another, than a state electrical code that prescribes safety standards for contractors who wire buildings for electricity. As in *Fisher*, the restrictions have been "unilaterally imposed by government . . . to the exclusion of private control." *Fisher*, 475 U.S. at 266.

Our conclusion in no way depends on the premise that the Massachusetts three-store limit serves the public interest or on the amici's dubious suggestion that the limit has no effect on price or output.[4] Whatever its purported or actual purpose, *cf. Johnson* v. *Martignetti*, 375 N.E.2d 290, 297 (Mass. 1978), it is common knowledge that many statutes regulate private activities to protect the narrow economic interests of other companies, often to the detriment of the public. *See* Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J.L. & Econ. 23, 23-24 (1983). But unless such a statute licenses or commands a *private* restraint, this is a matter for the voters and not for the federal courts—at least so far as the Sherman Act is concerned. Of course, such state statutes remain subject to the constraints of the Commerce Clause and other constitutional provisions.

This brings us to the separate question whether MPSA and the two wholesaler trade associations should have been allowed to intervene. The district court held that

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[4] In theory, the three-store limit might or might not affect price, depending on the extent of existing competition in specific local retail markets where (absent the limit) those who have three stores elsewhere in the Commonwealth might choose to operate. But energetic defense of the statute by MPSA is some indication that its members fear that more competition from larger chains would drive down price, improve service, or both.

the wholesalers' interests were too general and contingent to justify intervention; in the case of MPSA, whose members were subject to the very three-store regulation challenged by plaintiffs, the court said that its members did have a direct and concrete interest in defending the statute but that they were adequately represented by the Commonwealth. As for permissive intervention, the court found that all three trade associations could adequately express their views through amicus briefs.

The problem presented in this case is a common one: a private party attacks a regulatory statute or administrative rule; the state or its regulators are its defendants; and other parties having an economic interest in the validity or invalidity of the statute or regulation seek to intervene. The standard for intervention as of right is set forth in Rule 24(a)(2) as follows:

> Upon timely application anyone shall be permitted to intervene in an action: . . . when the applicant claims an interest relating to the property or tranaction which is the subject matter of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

In such cases, the timeliness of interventon and the practical impact on the would-be intervenor are rarely in dispute: it is the "interest" and "adequately represented" criteria that are usually decisive.

Rule 24(a)(2)'s reference to "an interest relating to the property or transaction" suggests that the drafters had in mind something narrower and more akin to property or contract interests in conventional private litigation as the necessary stake; but this narrow reading has not been accepted in practice. *See Daggett* v. *Commission on Gov-*

ernmental Ethics and Election Practices, 172 F.3d 104, 110 (1st Cir. 1999). We will therefore assume that the district court was right in holding that MPSA satisfied the "interest" requirement and assume *arguendo* (and solely to shorten the opinion) that the district court was wrong in holding that the wholesalers lacked such an interest.

But, perhaps as a counterweight to the broad reading of "interest," the courts have been quite ready to presume that a government defendant will "adequately represent" the interests of all private defenders of the statute or regulation unless there is a showing to the contrary. *See Public Serv. Co.* v. *Patch*, 136 F.3d 197, 207 (1st Cir 1998). And while there are various ways to show that state representation is not adequate, the burden of overcoming the presumption is upon the would-be intervenor, *Daggett*, 172 F.3d at 111. The trial court, in applying a general rule to specific facts, is usually accorded a measure of deference in making the adequate-representation determination, so long as the court applies the proper legal standards.[5] *Id.* at 111-12.

The would-be intervenors argue that the Commonwealth cannot be an adequate representative of their interests while it also regulates them. In support of this position, they point to *Conservation Law Found.* v. *Mosbacher*, 966 F.2d 39 (1st Cir. 1992), and the district court opinion in *Patch*, 173 F.R.D. 17 (D.N.H. 1997). In *Mosbacher*, we held that commercial fishing groups could intervene as of right to oppose a challenge to a state

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[5] In *Daggett* we were concerned that the district court might possibly have been misled by our own language in *Moosehead Sanitary Dist.* v. *S.G. Phillips Corp.* 610 F.2d 49, 54 (1st Cir. 1979), suggesting that only a limited number of "cubbyholes" existed for claims of inadequate representation. *See Daggett*, 172 F.3d at 113. In the present case, while the district court's decision cites *Moosehead*, it also makes clear that the court did not impose any artificial limitation on the way in which parties may show inadequate representation. *Massachusetts Food Ass'n*, 184 F.R.D. at 222-23.

agency's approval of a fishery plan, noting that the fishing groups were regulated by the agency. *Mosbacher*, 966 F.2d at 44. In *Patch*, the district court allowed intervention by several electric utilities who were largely aligned with state regulators in defending a major state reform plan that restructured retail power regulation in the state. *Patch*, 173 F.R.D. at 27-28. From these decisions, MPSA infers a general rule that the state defendant's representation is inadequate as a matter of course whenever it is also the *regulator* of the entity that seeks to intervene.

The cases do not support such a *per se* rule. We certainly did not adopt such a rule in *Mosbacher*, where the intervenors overcame the presumption of adequate representation by the government defendant because, *inter alia*, the agency had not filed an answer to the complaint but had instead accepted a consent decree providing for virtually all the relief sought and subjecting the fishing groups to more stringent rules than had previously been in effect. *Id.* at 44. It is not clear whether the district court was applying a *per se* rule in *Patch*; but in any event that part of its decision was not appealed to us.

Here, there is no doubt that the Commonwealth was zealously interested in upholding the validity of the statute. The only difference between it and the would-be intervenors was their interest in offering *other* legal arguments (for example, based on the Twenty-First Amendment) to sustain the statute. But these arguments were easily presented in amicus briefs. This is not a case where the complaint was framed so as to require an evidentiary determination and where the would-be intervenors had information that could only be presented by their participation as parties. *See generally Daggett*, 172 F.3d at 112.

The would-be intervenors point out that an amicus does not enjoy the same opportunities as a full-fledged

litigant even to offer legal argument; for example, in this court, amicus briefs are shorter than regular briefs and oral argument is at the court's discretion. Fed. R. App. P. 29(d), (g). But a court is usually delighted to hear additional arguments from able amici that will help the court toward right answers, and the amici can easily seek a larger allotment of pages or time to participate in oral argument. *See id.*

The more interesting claim is that the Commonwealth might refuse to appeal if it lost; or—if it won and plaintiffs sought *certiorari*—the Supreme Court might limit the questions to be considered to those set forth in the *certiorari* petition. But amici, like respondents, can advise the Supreme Court of missing arguments. *Davis* v. *United States*, 512 U.S. 452, 457 n.* (1994) (citing *Teague* v. *Lane*, 489 U.S. 288, 300 (1989) (plurality opinion)). And if the Commonwealth refused to appeal from a defeat, a would-be intervenor could then seek to intervene. 7C Wright, Miller & Kane, *Federal Practice and Procedure* § 1909, at 345 & n.38 (1986); *see also Daggett*, 172 F.3d at 112.

As for permissive intervention, the would-be intervenors likely met the low threshold set by Rule 24(b)—that their defenses included questions of law common to the defenses offered by the state. Fed. R. Civ. P. 24(b). But even where this necessary condition is present, the rule merely permits intervention at the discretion of the district court. *Daggett*, 172 F.3d at 112-13. The district court reasonably concluded that the Commonwealth was adequately representing the interests of everyone concerned to defend the statute and that any variations of legal argument could adequately be presented in amicus briefs. We see no abuse of discretion in this ruling.

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 98-11175-DPW

MASSACHUSETTS FOOD ASSOCIATION, ROCHE BROS. SUPERMARKETS, INC., THE STOP & SHOP SUPERMARKET COMPANY, PACKAGING CENTER, INC., BJ'S WHOLESALE CLUB, INC., MORMAX CORPORATION, THE EDWIN R. SAGE COMPANY, INC., TRADER JOE'S CO. AND TRADER JOE'S EAST, INC.,

Plaintiffs,

v.

WALTER J. SULLIVAN, CHAIRMAN, AND SUZANNE IANNELLA AND FREDERICK W. RILEY, INDIVIDUALLY IN THEIR REPRESENTATIVE AND OFFICIAL CAPACITIES AS MEMBERS OF THE MASSACHUSETTS ALCOHOLIC BEVERAGES CONTROL COMMISSION,

Defendants.

MEMORANDUM AND ORDER
January 6, 1999

The Massachusetts Food Association and several retail chains have brought this suit against the members of the Massachusetts Alcoholic Beverages Control Commission challenging the legality and constitutionality of a portion of Mass. Gen. Laws ch. 138, § 15. The plaintiffs assert that section 15's directive restricting to three the number of retail liquor licenses that any one individual or entity can possess in Massachusetts violates the federal Sherman

Antitrust Act and therefore is invalid under the Supremacy Clause of the United States Constitution. The defendants have moved to dismiss for failure to state a claim upon which relief can be granted, principally because § 15 represents unilateral state action beyond the reach of the federal antitrust laws. Meanwhile, the Wine & Spirit Wholesalers of Massachusetts, Inc., Massachusetts Wholesalers of Malt Beverages, Inc., and Massachusetts Package Stores Association have all moved to intervene in the case as defendants. The intervenors seek to press a broader range of issues at the motion to dismiss state. I will deny the motions to intervene, but will grant the defendants' motion to dismiss.

I. THE LITIGANTS

A. *The Plaintiffs*

The Massachusetts Food Association is a private trade association whose membership includes multi-outlet food retailers operating in Massachusetts. The remaining plaintiffs are corporations owning chains of retail stores in Massachuetts. Each corporation owns more than three stores in the Commonwealth but is restricted to only three liquor licenses. Roche Bros. Supermarkets, Inc., a Massachuetts corporation, operates 13 supermarkets in Massachusetts. The Edwin R. Sage Company, Inc., a Massachusetts corporation, operates six retail outlets in Massachusetts. The Stop & Shop Supermarket Company, a Delaware corporation, and its wholly-owned subsidiary, Packaging Center, Inc., a Massachusetts corporation, operate 93 supermarkets in Massachusetts. BJ's Wholesale Club, Inc., a Delaware corporation, and its wholly-owned subsidiary, Mormax Corporation, a Massachusetts corporation, operate 13 retail outlets in Massachusetts. Trader Joe's Co., a California corporation, and its wholly-owned subsidiary, Trader Joe's East, Inc., a

Massachusetts corporation, operate six retail outlets in Massachusetts. For the latter three sets of plaintiffs, the parent company and subsidiary are restricted to a combined total of three retail liquor licenses in Massachusetts.

B. *The Defendants*

The defendants are the individual members of the Massachusetts Alcoholic Beverages Control Commission (hereinafter "the Commission"), sued only in their representative and official capacities.[1] The Commission, a state agency created by Mass. Gen. Laws ch. 6, § 43, supervises "the conduct of the business of manufacturing, importing, exporting, storing, transporting and selling alcoholic beverages." Mass. Gen. Laws ch. 6, § 44. The Commission submits each year "recommendations for such legislation as it deems necessary or desirable for the better regulation and control of such traffic [of alcoholic beverages] and for the promotion of temperance in use of such beverages." *Id.*

C. *The Proposed Intervenors*

Two separate groups have moved to intervene as defendants in this action. The first group, Massachusetts Package Stores Association (hereinafter "MassPack"), is a trade association composed primarily of individual retail package stores. MassPack represents these retail stores "on legislative and regulatory matters, especially those relating to control of the sale of alcohol and the maintenance of public welfare and safety." (Mem. of Law in Supp. of Mass. Package Stores Ass'n Mot. to Intervene as of Right at 2.) One retail liquor store actually owned

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1 The plaintiffs originally sued only the Commission itself, but amended the complaint after defendants filed a motion to dismiss on Eleventh Amendment grounds.

by plaintiff The Stop & Shop Companies, Inc. is a member of the putative defendant intervenor, MassPack.

The second group consists of Wine & Spirits Wholesalers of Massachusetts, Inc. and Massachusetts Wholesalers of Malt Beverages, Inc. (hereinafter, collectively "the Wholesalers"). These two organizations are trade associations for wholesalers of alcoholic beverages operating in the Commonwealth. Wholesalers must be licensed by the state under Mass. Gen. Laws ch. 138, § 18. Retailers licensed under § 15 may only buy alcohol from wholesalers licensed under § 18. Mass. Gen. Laws ch. 138, § 18.

II. THE MOTIONS TO INTERVENE

At the outset, I must address the roles of MassPack and the Wholesalers in this litigaton. MassPack and the Wholesalers have each moved to intervene as of right under Fed. R. Civ. P. 24(a)(2). In the alternative, should I decide they are not entitled to intervene as of right, they request permissive intervention under Fed. R. Civ. P. 24(b)(2).

A. *Intervention as of Right*

Rule 24(a) provides that:

> Upon timely application anyone shall be permitted to intervene in an action . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

The First Circuit has set out a four-part test for intervention as of right under Fed. R. Civ. P. 24(a)(2): (a) the application must be timely; (b) the applicant must have an interest relating to the property or transaction which is the basis of the action; (c) the applicant must be so situated that the disposition of the action may set up a practical impediment to its ability to protect that interest; (d) the applicant must show that existing parties do not adequately represent its interests. *Public Serv. Co. of New Hampshire v. Patch*, 136 F.3d 197, 204 (1st Cir. 1998); *Travelers Indem. Co. v. Dingwell*, 884 F.2d 629, 637 (1st Cir. 1989).

In this case, the plaintiffs, who object to the applicants' motions to intervene, do not dispute the timeliness of the applications, nor do they present any serious opposition to the proposition that the applicants' own ability to protect any interests they may have will likely be impaired by this action. As a result, I will focus on whether the proposed intervenors have sufficient interests in the case to justify intervention and whether any such interests are adequately represented by the existing defendants.

1. Interests

While there is no definitive statement of what type of interest is required to justify intervention as of right, the First Circuit has said that "the intervenor's claim must bear a 'sufficiently close relationship' to the dispute between the original litigants," and "[t]he interest must be direct, not contingent." *Dingwell*, 884 F.2d at 638 (citations omitted). The interest must also be "significantly protectable." *Patch*, 136 F.3d at 205 (quoting *Donaldson v. United States*, 400 U.S. 517, 531 (1971)).

The proposed intervenors in this case claim essentially economic interests. The First Circuit in *Conservation*

Law Found. of New England, Inc. v. Mosbacher, 966 F.2d 39, 43-44 (1st Cir. 1992), held that the economic interests of fishermen were sufficient to justify intervention in a suit by environmental advocacy groups against officers of a federal agency proposing to enter into a consent decree concerning regulation of the fishing industry. The court reasoned that altering the regulations would change the economic circumstances of the fishing groups, and "[t]hese interests are not speculative simply because the explicit terms of the consent decree do not implement those changes, but merely begin a process through which they would come about." *Id.* at 43. As a result, a group may have interests sufficient to intervene in a suit concerning regulations which directly affect the group economically even if the regulations do not explicitly refer to that group. *See also New York Pub. Interest Research Group, Inc. v. Regents of Univ. of State of New York*, 516 F.2d 350, 351-52 (2d Cir. 1975) (pharmacists' association had a sufficient interest to intervene in a suit by consumers to enjoin university regents from enforcing a state regulation prohibiting advertisement of prices of prescription drugs).

However, the First Circuit has more recently cautioned that, while potential economic harm is an important factor in determining whether there is a sufficient interest, "[i]t is settled beyond peradventure . . . that an undifferentiated, generalized interest in the outcome of an ongoing action is too porous a foundation on which to premise intervention as of right." *Patch*, 136 F.3d at 205. In *Patch*, consumer groups sought to intervene in an action by utility companies against the state public utilities commissioners, asserting that the disposition of the case challenging the commission's plan would affect consumers' utility rates. The court found that an interest in lower utility rates was too general to be the basis

for intervention, because it was an interest common to every consumer and business in the state. *Id.* The court also found this interest to be overly contingent, because "numerous market variables will impact New Hampshire electric rates even after the PUC implements a restructuring plan," and "[w]hether interaction of these variables actually will produce lower rates is anybody's guess." *Id.* at 205-06.[2]

Applying First Circuit teachings to this case, I find that the Wholesalers have not set out an interest sufficient to justify intervention as of right. The Wholesalers assert that Mass. Gen. Laws ch. 138, § 15 is part of a comprehensive scheme regulating the sale of liquor in the commonwealth. They argue that because this scheme authorizes retailers to buy liquor only from authorized wholesalers, a change in the regulation of retailers will affect the Wholesalers economically.[3] The Wholesalers

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[2] It bears noting that the district court in *Patch* permitted several utility companies not in the suit originally to intervene because the changes in the state's utility plan at issue in the case would directly affect their business. *Public Serv. Co. of New Hampshire v. Patch*, 173 F.R.D. 17, 27 (D.N.H. 1997), *aff'd*, 136 F.3d 197 (1st Cir. 1998). The First Circuit did not address these rulings in affirming the district court's denial of intervention to the consumer groups and other parties.

[3] The Wholesalers' argument that, if this court rules for the plaintiffs, it would have to strike all of § 15, rather than just the three license limit, is both incorrect and irrelevant to this discussion. As Judge Wolf recently observed, state law governs the severability of a state statute, and under Massachusetts law, if a court finds a part of a statute to be unconstitutional, the court should find the remainder of the statute constitutional and valid as far as possible if the remaining parts are severable. *Canterbury Liquors & Pantry v. Sullivan*, 999 F. Supp. 144, 147 (D. Mass. 1998). Here, the remainder of § 15 is clearly severable. Furthermore, even if all of § 15 were to be struck, the Wholesalers would still not have a sufficient interest because no part of the section is directly relevant to the Wholesalers' businesses.

further speculate that § 15 helps to maintain an orderly market, and disruption of this order will disrupt their businesses and will undermine the promotion of temperance in the interest of public health and safety. Any speculative interest that the Wholesalers have in public health and safety in this connection is, however, identical to the interests of the Commonwealth, and therefore, under *Patch*, not sufficient. The Wholesalers' remaining interests are all essentially economic in nature.[4]

The Wholealers' economic interests in this case are simply too general and too contingent to be sufficient. To be sure, the Wholesalers' interests are not quite as general as those of the consumer groups in *Patch* which were shared by all consumers of electricity in the state. Nonetheless, § 15 does not address the Wholesalers at all; it merely affects a broad market in which they play a separate part. The Wholesalers will not necessarily be more directly affected by the outcome of this case than anyone else involved in liquor production and sales in Massachusetts, potentially including consumers. Allowing anyone to intervene in this or any other case who in some sense may be affected by a change in the challenged statute—regardless of whether the party is in fact directly regulated by the statute at issue—is not a manageable way to organize litigation.

In addition, the Wholesalers' interests are entirely contingent. The effect on their businesses of a change in the nature and number of retailers in the Commonwealth "is

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[4] The Wholesalers' reply memorandum simply elaborates on their asserted economic interests in the case, premised on the fact that eliminating the three license limit on retailers would have industry-wide effects. Their claim that such a change could endanger family-owned businesses which have benefitted the community in civic and charitable ways (*Id.* at 5) is simply another—and quite conjectural—way of stating a potential economic harm.

anybody's guess." *Patch*, 136 F.3d at 206. Perhaps wholesalers would benefit from more competition at the retail level or see no effect on their businesses at all. The Wholesalers have not identified anything beyond a general interest in a case touching on the broadly defined commercial setting in which they participate.

MassPack asserts interests that are more direct. Specifically, § 15 regulates retailers of liquor, including the members of MassPack. Elimination of § 15's three license limit will affect MassPack members themselves, potentially enabling them to get licenses for more than three stores, and, more importantly for them, may change the number and nature of their competitors. MassPack's interest in this case is not a general one; the regulation in question governs its members directly, and their interests are different from those of the general public or of any business outside of the liquor retail sector. Indeed, "preserving the right of small, independent liquor dealers to do business" is one of the recognized purposes of the three license restriction. *Johnson v. Martigneti*, 374 Mass. 784, 792 (1978).

The plaintiffs' contention that MassPack's interest is not protectable because it is anticompetitive does not affect intervention analysis. MassPack is not seeking protection under the antitrust laws, which, as the plaintiffs assert, cannot be used for anticompetitive purposes. Rather, MassPack is seeking to preserve a state regulatory statute which it claims benefits its members and which may in part be intended to benefit its members. The plaintiffs are essentially inviting me to presume that § 15 violates antitrust principles for the purposes of this motion to intervene. I make no such presumption at this time.

Even though § 15 regulates retailers directly, it is not immediately clear whether the economic interest Mass-

Pack's member retailers have in this case is direct or contingent. The plaintiffs argue that the economic effect of a rejection of the three license limit on MassPack members, like that on the Wholesalers, "is anybody's guess." *Patch*, 136 F.3d at 206. MassPack members could potentially even benefit from such a change, setting up additional retail stores themselves. More likely, however, the entry of more and larger competitors into the retail liquor market will have a negative economic effect on some small retail operations. The interest in economic security seems direct and concrete enough to find that MassPack has a sufficient interest in the case for intervention purposes.

2. Adequate Representation

By contrast, I find that MassPack's interests are adequately represented by the Commonwealth in this case.[5] Of course, "[a]n intervenor need only show that representation may be inadequate, not that it is inadequate." *Mosbacher*, 966 F.2d at 44; *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972). However, while an applicant for intervention "need only make a minimal showing" of inadequacy, "the adequacy of interest requirement is more than a paper tiger. A party that seeks to intervene as of right must produce some tangible basis to support a claim of purported inadequacy." *Patch*, 136 F.3d at 207.

The applicants for intervention in this case run up against two basic presumptions of adequate representation. The First Circuit in *Patch* held that commissioners de-

[5] Even if the Wholesalers did have a sufficient interest to justify intervention as of right, I would deny them intervention as of right because their interests are also adequately represented by the Commonwealth. The same reasoning I use in discussing this issue in relation to MassPack applies equally to the Wholesalers.

fending an action in their capacity as members of a representative governmental body are presumed to represent the interests of their constituents adequately. *Id.* This presumption applies in the current case as well, because the defendants are commissioners appointed by the governor and here sued in their representative capacity. To rebut this presumption "requires 'a strong affirmative showing' that the agency (or its members) is not fairly representing the applicant's interests." *Id.* (citation omitted). More generally, "[w]here the party seeking to intervene has the same ultimate goal as a party already in the suit, courts have applied a presumption of adequate representation." *Moosehead Sanitary Dist. v. S.G. Phillips Corp.*, 610 F.2d 49, 54 (1st Cir. 1979). Here, the proposed intervenors and the original defendants have precisely the same goal—defending the validity of the three license limit on retailers of liquor.

To overcome this latter presumption, an applicant for intervention traditionally had to show "adversity of interest, collusion, or nonfeasance." *Id.* The First Circuit has also recognized that evidence that the original parties are "sleeping on their oars" or are engaged in settlement talks may be enough to show inadequate representation. *Mosbacher*, 966 F.2d at 44; *Moosehead*, 610 F.2d at 54-55.

The applicants for intervention have some basis for arguing that they overcome these presumptions. MassPack's members are retailers specifically regulated by the Massachusetts Alcoholic Beverages Control Commission. (The Wholesalers are similarly regulated by the Commission, albeit not under § 15.) The district court in *Patch* held that a regulatory commission and the subjects of its regulation are in "a traditionally adversarial relationship" sufficient to overcome the presumption of adequacy. *Pub-*

lic Serv. Co. of New Hampshire v. Patch, 173 F.R.D. 17, 28 (D.N.H. 1997), *aff'd*, 136 F.3d 17 (1st Cir. 1998).[6] Several other courts have reached a similar conclusion, contending, as the applicants for intervention do here, that a governmental agency's need to represent the public interest conflicts with its representation of members of the industry it regulates. *See Coalition of Arizona/New Mexico Counties for Stable Econ. Growth v. Department of the Interior*, 100 F.3d 837, 845 (10th Cir. 1996); *NYNEX Corp. v. Federal Communications Comm'n*, 153 F.R.D. 1, 3 (D. Me. 1994).

First Circuit precedent, however, suggests that this potential divergence of interests by itself is insufficient to overcome the dual presumption of adequate representation present in this case. In *Patch*, the First Circuit found that the applicants for intervention had suggested no legal arguments that the government agency could not or would not make. *Patch*, 136 F.3d at 208. Further, the *Patch*, court noted that the governmental defendants in that case had "launched a full-scale uncompromising defense." *Id.* Here, also, the defendants have launched a vigorous defense, including two motions to dismiss as the outset. The defendants appear to be willing and able to present all defenses that the proposed intervenors could advance.[7] "This circumstance, in itself, weighs heavily in

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[6] The district court made this statement in the course of its decision to allow several utility companies to intervene. Because the grant of intervention rights to those parties was not appealed, the First Circuit did not address this issue.

[7] To be sure, there are apparent in the submisssions of the defendants and those of the proposed intervenors differences of emphasiss presumably as a result of somewhat different views regarding the issues to be pressed at the motion to dismiss stage. The defendants—unlike the Wholesalers who offer a full argument—treat the 21st Amendment question only in a footnote and do not treat at length, as the Wholesalers do, the question of whether

favor of denying mandatory intervention." *Id.; accord International Bhd. of Teamsters v. J.F. Partyka & Son, Inc.*, 176 F.R.D. 429, 432 (D. Mass. 1997) (finding that the fact that a union has energetically pursued the grievance in question supports a finding of adequate representation).

Indeed, as Judge Keeton has observed, the First Circuit generally finds inadequate representation by a governmental agency only when that agency fails to pursue a case wholeheartedly or when its interests diverge in fact from the proposed intervenors' interests. *Resolution Trust Corp. v. City of Boston*, 150 F.R.D. 449, 454 (D. Mass. 1993); *see Mosbacher*, 966 F.2d at 44 (inadequate representation found where governmental defendant did not file an answer to the complaint, instead signing a consent decree agreeing to most of the relief sought); *Moosehead*, 610 F.2d at 49 (adequate representation found when sanitary district's attorneys were not "sleeping on their oars"). Where, as here, the original defendants have defended the case vigorously, "a logical possibility of divergence, without any indication of actual divergence, does not suffice for the purposes of intervention of right." *Resolution Trust Corp.*, 150 F.R.D. at 454.

The First Circuit, in looking at adequacy of representation, considers three additional factors: (1) whether the interests of the present party are sufficiently similar to the

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ownership limitations constitute a per se antitrust violation; nor do the defendants argue separately and extensively, as both the wholesalers and MassPack do, the question of *Parker v. Brown* immunity. As my disposition of the motion to dismiss suggests, the choice by the defendants of issues to present at the motion to dismiss stage appears sound. The additional arguments the proposed intervenors pressed at this stage appear more appropriate for consideration after some factfinding, if that were necessary.

applicants' interests that the present party will definitely make the applicants' legal arguments, (2) whether the present party is willing and able to make those arguments, and (3) whether the applicants, if allowed to intervene, would add some necessary element to the case. *United Nuclear Corp. v. Cannon*, 696 F.2d 141, 145 (1st Cir. 1982).

Here, the applicants for intervention point to very little of significance that they can add to this case. MassPack argues that it will bring the perspective of its members, who have a potential economic stake in the continuation of the three license limit, which is different from the public interest-oriented perspective that the Commission members will bring. However, the issues in this case are almost exclusively legal issues to be decided based on judicial construction of statutes and the constitution; different sets of facts or different perspectives on the part of the litigants will change little in the arguments before the court. The proposed intervenors, particularly the Wholesalers, also question the brevity of the original defendants' treatment of certain legal issues and their failure to mention certain important cases in their memorandum supporting their motion to dismiss. However, where the Commission members are aggressively pursuing their defense in general and at this stage appear to have at least identified the potential defenses, *see* note 7 *supra*, I will not find that strategic differences, different uses of caselaw or a welcome consciseness in presentation to be grounds for a finding of inadequate representation.[8]

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[8] The Wholesalers also point out that when another liquor regulation was recently struck down in *Canterbury Liquors & Pantry v. Sullivan*, 16 F. Supp.2d 41 (D. Mass. 1998), the Attorney General declined to appeal the decision. The case went on to the First Circuit only because the Wholesalers, who had intervened as defendants, appealed. The First Circuit, however, decided that the Whole-

Overall, it appears that MassPack must rely on the inherent adversity between regulators and those they regulate as its basis for a finding of inadequate representation. Because that adversity appears to have little relevance to the argument of this case and because of the First Circuit's strong presumptions of adequate representation when parties have the same ultimate goal and when a governmental organization is the existing party, I find that neither MassPack nor the Wholesalers has established that the named defendants will inadequately represent its interests. As a result, I conclude neither MassPack nor the Wholesalers is entitled to intervention as of right.

B. Permissive Intervention

Both MassPack and the Wholesalers ask that they be permitted to intervene pursuant to Fed. R. Civ. P 24(b)(2) in the event that they are denied intervention as of right. Fed. R. Civ. P. 24(b) states in relevant part:

> Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

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salers lacked standing to bring an appeal. *Sea Shore Corp. v. Sullivan*, 158 F.3d 51 (1st Cir. 1998). The court concluded that where a defendant "intervenor does not receive a direct benefit from a reversal of the decision below, it is not 'likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'" *Id.* at 58 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). It is by no means clear that the Wholesalers could make any more substantial standing here if I were to rule for the plaintiffs.

District courts have "broad discretion" in deciding whether or not to grant permissive intervention under Fed. R. Civ. P 24(b)(2). *Travelers Indem. Co. v. Dingwell*, 884 F.2d 629, 641 (1st Cir. 1989). The First Circuit has pointed to three factors that can make permissive intervention appropriate, two of which come directly from the statute: "(1) 'the applicant's claim or defense and the main action have a question of law or fact in common;' (2) the applicant's interests are not adequately represented by an existing party; and (3) intervention would not result in undue delay or prejudice to the original parties." *In re Thompson*, 965 F.2d 1136, 1142 n.10 (1st Cir. 1992).

Here, the applicants wish to present essentially the same defense as the existing defendants, so they clearly fulfill the first prong of this test. However, as explained at length above, the applicants have not shown that the Commission members do not adequately represent their interests. This failure diminishes the case for permissive intervention.

As discussed above, MassPack and the Wholehalers would add very little to this case. This is not a fact-based dispute, so different facts, opinions and perspectives are of relatively limited assistance to the court. Similarly, the applicants for intervention do not appear to have different legal arguments. They would simply provide new case citations and would make the different strategic choice of raising the 21st Amendment issue now, rather than noting it and reserving it for the future, as the existing defendants have. MassPack and the Wholesalers have "presented no creditable argument that [their] status as [] intervenor-defendant[s] would in any way reshape the issues in this case or contribute to its just resolution." *Resolution Trust Corp.*, 150 F.R.D. at 455.

And despite their protestations to the contrary, MassPack and the Wholesalers would, if brought into this lawsuit, inevitably increase the demands of case management for the court and the other parties. I conclude that they would contribute little more to this case than alternatively phrased legal arguments. This they can do through their present role as amici curiae. Because they have "not shown any justification for the delay and added demands on resources of the court and the parties that [their] intervention would be likely to cause," *id.*, I will exercise my discretion and deny the applicants' requests for permission to intervene.

III. THE MOTION TO DISMISS

In reviewing a motion to dismiss, I "must take the allegations in the complaint as true and must make all reasonable inferences in favor of the plaintiffs." *Watterson v. Page*, 987 F.2d 1, 3 (1st Cir. 1993) (citing *Monahan v. Dorchester Counseling Ctr.*, 961 F.2d 987, 88 (1st Cir. 1992)). However, I "will not accept a plaintiff's unsupported conclusions or interpretations of law." *Carreiro v. Rhodes Gill & Co.*, 68 F.3d 1443, 1446 (1st Cir. 1995). Furthermore, I may grant dismissal only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Roeder v. Alpha Indus.*, 814 F.2d 22, 25 (1st Cir. 1987) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

Applying this standard, I address only two legal issues: whether the allegation that Mass. Gen. Laws ch. 138, § 15 sets out a per se vioation of the antitrust law is sufficient and whether, even if § 15 involves a per se antitrust violation, the statute constitutes unilateral state action beyond the reach of the federal antitrust laws. Because after consideration of these two issues I find dismissal is

appropriate, I need not reach the two additional grounds for dismissal argued at greater length by the proposed intervenors, whom I treat as amici curiae: whether the challenged restriction qaulifies for state action immunity and whether the Twenty-first Amendment protects the statute even if it violates federal antitrust law.

A. Does § 15 Establish a Per Se Antitrust Violation?

The plaintiff specifically challenges the portion of Mass. Gen. Laws ch. 138, § 15 which provides with reference to liquor retail licenses, "No person, firm, corporation, association, or other combination of persons . . . shall be granted, in the aggregate, more than three such licenses in the commonwealth." They assert that this restriction facially conflicts with the Sherman Antitrust Act, 15 U.S.C. § 1, *et seq.*, and is therefore preempted under the Supremacy Clause of the United States Constitution.

The Supreme Court has held that:

> a state statute, when considered in the abstract, may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute. Such condemnation will follow under § 1 of the Sherman Act when the conduct contemplated by the statute is in all cases a per se violation.

Rice v. Norman Williams Co., 458 U.S. 654, 661 (1982). A statute's adverse effect on competition is not enough to trigger preemption; indeed, the states would be crippled in their efforts to engage in any economic regulation if it were. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 133 (1978).

The defendants have suggested that the conduct mandated by § 15 might not constitute a per se violation even if engaged in by agreement of private parties, but they do not press this as a grounds for dismissal.[9] Nonetheless, I will briefly consider whether the allegation that § 15 constitutes a per se violation of the antitrust laws such that it may be subject to preemption.

Per se violations are those that "are so 'plainly anticompetitive' and so often 'lack . . . any redeeming virtue' that they are conclusively presumed illegal without further examination under the rule of reason generally applied in Sherman Act cases." *Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 8 (1979) (internal citations omitted). They are agreements which "so often prove so harmful to competition and so rarely prove justified that the antitrust laws do not require proof that an agreement of that kind is, in fact, anticompetitive in the particular circumstances," *Nynex Corp. v. Discon, Inc.*, 119 S. Ct. 493, 497 (1998). In general, "[i]t is only after considerable experience with certain business relationships that courts classify them as per se violations." *Broadcast Music*, 441 U.S. at 9 (quoting *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 607-08 (1972)).

Plaintiffs argue that § 15 is an output restriction, fitting it into a common category of per se violation. In *National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Oklahoma*, 468 U.S. 85 (1984), the Supreme Court found that the NCAA's restriction on the number of football games member universities could televise "create[d] a limitation on output; our cases have held that such limitations are unreasonable restraints of trade." *Id.* at 99. At first blush, § 15's restriction on the number of retail liquor

[9] As noted, the wholesaler amici press this point more forcefully.

licenses a company may possess appears to have characteristics similar to the NCAA's restriction on the number of football games schools may televise and to other output restrictions found to be per se violations of the Sherman Act.

However, § 15 is not a traditional limitation on output. In restricting the number of retail stores any individual or company may own, Massachusetts is not necessarily limiting the total number of liquor retail stores or the total amount of liquor sold in the Commonwealth. It may be viewed as simply spreading this output among more retailers. Furthermore, since a restriction on the number of stores an individual entity may own is different from traditional output restrictions which directly limit the amount of a product that individuals may sell, it is by no means clear that the three license ownership limit fits into a category of restriction about which courts have "considerable expertise" and so can classify as a per se violation. Nor is it clear that the statute places irresistible pressure on private parties to violate the antitrust laws.

Nonetheless, at this stage, I find that the plaintiffs' pleadings establish a sufficient possibility of a per se violation to survive a motion to dismiss. Section 15 may in fact have the effect of limiting output in a way that would necessarily be impermissible under the Sherman Act if engaged in by private parties. Without further factual development, it is difficult not to characterize § 15's three license ownership limit as a practice which "facially appears to be one that would always or almost always tend to restrict competition and decrease output." *Broadcast Music*, 441 U.S. at 19-20. Certainly, the intent of § 15 is to dampen output by regulating sales and encouraging temperance:

> Concentration of retailing in the hands of an economically powerful few has been thought to intensify the

> dangers of liquor sales stimulations, thereby threatening trade stability and promotion of temperance. Regulation of the number of licenses issued, therefore, aims at controlling the tendency toward concentration of power in the liquor industry; preventing monopolies; avoiding practices such as indiscriminate price cutting and excessive advertising; and preserving the right of small, independent liquor dealers to do business.

Johnson v. Martignetti, 374 Mass. 784, 792 (1978). As a result, I would not deprive the plaintiffs solely on these pleadings the chance to develop a record supporting the proposition that the three license limit is a per se violation which is plainly anticompetitive and lacks redeeming virtue.

B. Does § 15 Constitute Unilateral State Action Immune from the Antitrust Laws?

Although I will accept at this stage the proposition that the plaintiffs have adequately pled that the three license restriction would have constituted a per se violation if it had been the product of private concerted action, defendants may still prevail if § 15 constitutes unilateral state action. The federal antitrust laws do not apply to unilateral state action, so plaintiffs have not presented a colorable claim, and the action must be dismissed.

Section 1 of the Sherman Act "reaches unreasonable restraints of trade effected by a 'contract, combination . . . or conspiracy' between separate entities. It does not reach conduct that is "wholly unilateral.' " *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984) (quoting *Albrecht v. Herald Co.*, 390 U.S. 145, 149 (1968)). In *Fisher v. City of Berkeley*, 475 U.S. 260 (1986), the Supreme Court applied this principal to a municipal rent control ordinance, holding that laws uni-

laterally imposed by the government are outside of the Sherman Act and so cannot be in impermissible conflict with it. *Id.* at 266-67. The Court further held that the fact that property owners obeyed the statute did not create a combination or conspiracy between the city and the property owners or among the property owners. *Id.* at 267. Thus, the fact that retailers in Massachusetts obey the three license limit set out by § 15 does not create a conspiracy.

To be sure, the Court in *Fisher* found that some government-imposed restraints do not constitute unilateral action outside the scope of § 1 of the Sherman Act. These the Court characterized as "hybrid" restraints. *Id.* at 267-68. Under a hybrid restraint, "nonmarket mechanisms merely enforce private marketing decisions," such that "private actors are thus granted 'a degree of private regulatory power.'" *Id.* at 268 (citation omitted). *Fisher* referenced two previous cases in which the Supreme Court had invalidated statutes because they constituted hybrid restraints. Examination of those and related cases is useful in determining whether § 15 is a hybrid restraint.

In *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951), the Court struck down as contrary to the Sherman Act a Louisiana law which allowed liquor distributors and retailers to make contracts fixing retail prices and then prevented any retailer, whether or not a party to the contract, from selling at less than the prices stipulated in such a contract. *Id.* at 386-90. Similarly, in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), the Court invalidated a regulation which provided that wine prices posted by a single wholesaler would be binding upon all wholesalers within a designated trading area. *Id.* at 99-100, 103. In both of these cases, the contested statute gave a private party the power to set prices which the state then enforced

as to that party and others. It was this private regulatory power that made these statutes impermissible hybrid restraints.

Judge Wolf recently found that a Massachusetts statute that allowed wine wholesalers to set prices and then held them to those prices for a month without any review by the state as to the reasonableness of the price constituted just such a hybrid restraint in violation of the Sherman Act. *Canterbury Liquors & Pantry v. Sullivan*, 16 F. Supp.2d 41, 45-46 (D. Mass. 1998), *appeal dismissed sub nom. Sea Shore Corp. v. Sullivan*, 158 F.3d 51 (1st Cir. 1998). *See also Miller v. Hedlund*, 813 F.2d 1344, 1351 (9th Cir. 1987), *cert. denied*, 484 U.S. 1061 (1988) (invalidating as hybrid a similar Oregon statute).

The restriction challenged here, however, is quite different. It does not cede price setting power to private parties without state review. Section 15 gives private retailers no discretion as to the maximum number of retail licenses they may obtain. Instead, the statute unilaterally sets the limit on liquor retail licenses at three. The retailers governed by this limit may properly do nothing but obey it. Section 15 resembles the ordinance in *Fisher*, which dictated the specific rent ceilings property owners must follow. *Fisher*, 475 U.S. at 269. As in *Fisher*, the contested statute here lacks the requisite concerted action to trigger § 1 of the Sherman Act.

Plaintiffs argue that § 15 is in fact a hybrid regulation because it restricts one element of competition, while giving retailers discretion to determine the location, size and output of their retail stores. I find, however, that any discretion as to the size and nature of retail stores is wholly collateral to § 15's three license ownership limit.[10]

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[10] Defendants vigorously contest this assertion, pointing to numerous statutory controls as to the number and nature of liquor re-

Plaintiffs have not challenged regulations governing the location, size or output of retail stores; they have only challenged the limit on the number of licenses an individual can hold. As to that limit, retailers have no discretion. This places § 15 in similar posture as the ordinance in *Fisher*, which set limits on the rent landlords could charge but left to the landlords' discretion the location and nature of the property they could rent out.[11]

Applying *Fisher* and comparing § 15 to the statutes struck down in *Midcal* and *Schwegmann*, I find the contested portion of § 15 to be unilateral state action outside the scope of § 1 of the Sherman Act. Because § 15 has survived the "first level preemption inquiry of *Rice*," I need not explore the next sequential level: whether *Parker v. Brown*, 317 U.S. 341 (1943), state action immunity is available to defend the statute. *See generally*, Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law*, ¶ 217c, at 315 (rev. ed. 1997).

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tail stores. I need not address this dispute because the provision challenged here, irrespective of residual discretion as to collateral questions of location, size and output, is unilateral state action simpliciter.

[11] The plaintiffs look to *Hertz Corp. v. City of New York*, 1 F.3d 121 (2d Cir. 1993), *cert. denied*, 510 U.S. 1111 (1994) for support. In *Hertz*, a rental car company challenged a city statute which prohibited rental car companies from charging differential fees based on a customer's residence. *Id.* at 124. The Second Circuit found New York City's law to be a hybrid restraint in violation of the Sherman Act "because it removes one element of competition in car-rental pricing, but does not further regulate or review the prices set by rental companies."

I find the reference to *Hertz* unpersuasive. As a leading commentary on antitrust law observes, "The ordinance in *Hertz* did not give any private actor the discretion to impose any kind of restraint at all; as a result, its analysis is fundamentally inconsistent with [governing Supreme Court precedent]." 1 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 217c, at 319 (rev. ed. 1997).

V. CONCLUSION

For the reasons set forth more fully above, the motions of MassPack and the Wholesalers to intervene as defendants are DENIED, and the motion of the defendants to dismiss for failure to state a claim is GRANTED.

/s/ Douglas P. Woodlock
DOUGLAS P. WOODLOCK
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 98-11175-DPW

MASS. FOOD ASSOCIATION, *et al.*,
Plaintiffs,

v.

MASS. ABCC,
Defendants.

ORDER OF DISMISSAL

WOODLOCK, District Judge

In accordance with this Court's Memorandum and Order issued January 6, 1999, is hereby ORDERED that the above-entitled action be and hereby is DISMISSED.

BY THE COURT,

/s/ Michelle Rynne
Deputy Clerk

Dated: January 7, 1999